STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 25, 2007
v	No. 270213 Macomb Circuit Court
KOU XIONG, Defendant-Appellant.	LC No. 2005-002939-FC

Before: Borrello, P.J., and Jansen and Murray, JJ.

PER CURIAM.

Defendant appeals as of right his jury-trial conviction of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a). Pursuant to MCL 769.12, defendant was sentenced as a fourth habitual offender to life in prison. We affirm defendant's conviction, but vacate defendant's sentence and remand for resentencing consistent with this opinion.

I

Defendant, also known as "Kool X," was a frequent library patron. He went to the library three or four times a week to use a computer. The twelve-year-old victim lived across the street from the library with her family. The victim was also a frequent patron of the library.

On the afternoon of March 10, 2005, a library patron approached the library staff at the circulation desk. The patron informed the staff that there was inappropriate conduct occurring in one of the library's aisles. Library employee Connie DiFatta walked to the aisle. DiFatta saw defendant sitting on a stool with his legs spread. The victim was standing in between defendant's legs with her back toward DiFatta. DiFatta could see defendant's face but could not see defendant's hands. According to DiFatta, the victim did not appear to be struggling.

DiFatta told defendant that he was engaged in inappropriate behavior and that he needed to leave the library immediately. DiFatta also told the victim that she needed to go home and tell her parents what she and defendant had been doing. Both defendant and the victim left the library at that time.

At trial, the victim testified that she had been walking down the library aisle and looking at books when defendant, who was sitting on a stool, "grabbed [her] butt." The victim testified that defendant then put his finger into her "private part." The victim testified that, before

defendant touched her, he pulled her pants down to her knees. Defendant stopped touching the victim when DiFatta walked into the aisle, and the victim then went home. The victim testified that she told her father what had happened and that her father called the police.

DiFatta testified that the victim returned to the library later on the afternoon of March 10, 2005, and that she exclaimed, "[H]e touched my private parts." According to DiFatta, the victim appeared to be upset at that time. DiFatta discussed the situation with her supervisors, including Jane Koger, and then left the library. According to Koger, the victim and her mother returned to the library after DiFatta had left. Koger spoke with them, and subsequently called the police later that evening.

The following day, a registered nurse examined the victim. The victim told the nurse that a man had rubbed her leg and her private parts "from where [she] pee[d]," and had kissed her on the lips. The nurse asked the victim whether defendant had penetrated her vagina or anus with his penis, finger, tongue, or a foreign object. The victim replied that there had been no penetration. However, the nurse was not sure whether the victim had understood her questions regarding penetration.[1] In examining the victim, the nurse found "a fairly fresh scratch" on the inner left thigh. The nurse did not find any injuries to the victim's vaginal or anal areas.

After defendant was arrested and extradited to Michigan, he was interviewed by United States Secret Service Agent Michael Suratt.[2] During the interview, Suratt reiterated each of the victim's allegations to defendant and asked defendant if the allegations were true. Suratt testified that defendant was "nodding and saying, yes, that happened, yes, that happened, yes, that happened." According to Suratt, defendant admitted that he had kissed the victim on the mouth, placed his hands in her pants, and rubbed her bare buttocks with his hand. Also according to Suratt, defendant admitted that while he rubbed the victim's buttocks, his finger penetrated her anus for approximately three seconds. Detective Kroll, who was also present during the interview, confirmed that "a question [regarding anal penetration] was posed to [defendant], he nodded affirmatively and stated, yes, that's how it happened."

Suratt asked defendant to put his admissions into writing. Defendant agreed and he began to write a statement. He wrote that he was at the library on March 10, 2005, and that he came into contact with the victim. However, defendant then stopped and informed Suratt that he no longer wanted to provide a written statement.

Retired Hampton Township police officer Gary Morgan testified that on April 2, 1990, he received a complaint regarding the sexual assault of an eight-year-old girl. Through his

[1] There is some indication in the record that the victim is learning disabled and attends special education classes.

[2] Suratt explained that the United States Secret Service works in cooperation with the National Center for Missing and Exploited Children and conducts many interviews regarding child sexual assaults. The Warren police apparently requested that Suratt interview defendant. Detective Martin Kroll of the Warren police department was present during Suratt's interview of defendant.

investigation, Morgan learned that the alleged perpetrator was defendant. Morgan interviewed defendant in April 1990. According to Morgan, defendant admitted that he had engaged in sexual conduct with the eight-year-old, for whom he was a babysitter. Also according to Morgan, defendant admitted that the eight-year-old was not wearing clothes, that the eight-year-old sat on his lap, and that he then became aroused and penetrated the eight-year-old's vagina with his penis. Morgan testified that defendant maintained that the eight-year-old girl had initiated the sexual conduct, that defendant was initially charged with CSC I, but that he ultimately pleaded guilty to second-degree criminal sexual conduct (CSC II).

Defendant testified that on the afternoon of March 10, 2005, he sat on a stool in one of the library's aisles while he waited for a computer terminal to become available. Defendant testified that he looked at a book while he was waiting on the stool, and that when he finished looking at the book, he took his Gameboy out of his pocket. According to defendant, the victim approached him approximately 20 minutes later. Defendant testified that the victim spoke to him briefly, left, and then returned. He testified that the victim then asked him whether she could use his Gameboy, that she attempted to grab it from him, and that she knocked his hat off his head. Defendant stated that as he attempted to pick up his hat, the victim jumped on him and he almost fell off the stool. He testified that as he tried to gain control, his left hand "accidentally went up [the victim's] crotch," and that he "must have rubbed her private area." Defendant stated that he and the victim "had a little laugh," that the victim then picked up his hat, and that "that's when [DiFatta] came."

According to defendant, when Suratt interviewed him, Suratt asked him to speculate. Specifically, defendant asserted that Suratt asked him to speculate whether it would have been possible to touch the victim's anus if he had placed his hands on the victim's buttocks in a certain way. Although defendant agreed that it would have been possible, he testified that he never admitted that he had actually touched the victim's buttocks.

II

Defendant first argues that the trial court erred in admitting evidence that he sexually assaulted a child in 1990 and pleaded guilty to CSC II. Specifically, defendant contends that the testimony of detective Rogers violated MRE 404(b), that MCL 768.27a constitutes an ex post facto law as applied in this case, that MCL 768.27a was improperly given retroactive application, that MCL 768.27a is an unconstitutional statutory rule of evidence, and that the evidence of his prior guilty plea was irrelevant and unfairly prejudicial.

We review a trial court's evidentiary decisions for an abuse of discretion. *People v Martin*, 271 Mich App 280, 315; 721 NW2d 815 (2006). A trial court abuses its discretion when it fails to select a principled outcome. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). We review de novo questions concerning the constitutionality of a statute and questions of statutory interpretation. *People v Piper*, 223 Mich App 642, 645; 567 NW2d 483 (1997); *People v Hammons*, 210 Mich App 554, 557; 534 NW2d 183 (1995).

Before trial, the prosecutor moved pursuant to MRE 404(b) to admit evidence of defendant's prior plea-based conviction of CSC II. According to the prosecutor, the present case was "similar in nature" to the facts underlying defendant's prior conviction because (1) the minor victims were close in age, (2) defendant secluded each victim, and (3) defendant pulled down the

pants of each victim and penetrated each victim's vagina.[3] According to the prosecutor, defendant's prior bad act was relevant to show defendant's knowledge, motive, plan, scheme, intent, and absence of mistake.

The trial court denied the prosecutor's motion because there was not the necessary degree of similarity between the two cases. According to the trial court, the only commonality between the two cases was that both of the victims were under the age of 13. In the prior case, defendant had an ongoing relationship with the victim, whereas in the present case, there was no custodial relationship. In addition, whereas the sexual conduct in the prior case occurred in the privacy of a home, the sexual conduct in the present case occurred in the public setting of a library. Lastly, the defenses asserted by defendant were different in the two cases. In the prior case, defendant admitted to the sexual conduct but said that the eight-year-old victim was the aggressor. In the present case, defendant was arguing either that the sexual conduct never occurred or that it was accidental.

The trial court noted that, in the present case and similar cases, "it sure would be a simpler process . . . had Michigan adopted Federal Rule of Evidence 414." FRE 414(a) provides:

> In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.

The prosecutor noted that the Michigan Legislature was in the process of adopting a statute similar to FRE 414. However, because the pending bill "[h]ad not been passed," the trial court stated that "there's no issue for the Court."

The prosecutor subsequently moved the trial court to reconsider its ruling barring the admission of evidence of defendant's prior conviction. Because the Legislature had recently enacted MCL 768.27a, which essentially mirrors FRE 414, the prosecutor requested that the statute be applied to defendant's trial, which was scheduled to begin in December 2005. In response, defendant argued that MCL 768.27a was a statutory rule of evidence and conflicted with MRE 404(b). Defendant also claimed that application of MCL 768.27a would violate the constitutional prohibition against ex post facto laws. Defendant finally argued that any evidence of his prior conviction was irrelevant and unfairly prejudicial. The trial court denied the prosecutor's motion for reconsideration. Because MCL 768.27a was not set to take effect until January 1, 2006, the trial court ruled that MCL 768.27a did not apply to defendant's trial.[4]

Defendant's trial was subsequently adjourned until February 2006. In January 2006, the prosecutor again moved the trial court to admit evidence of defendant's prior conviction under MCL 768.27a. Satisfied that defendant's prior CSC II conviction was relevant to the present

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[3] Defendant was originally charged with digital-vaginal penetration rather than digital-anal penetration.

[4] MCL 768.27a took effect on January 1, 2006. See 2005 PA 135.

case, the trial court granted the prosecutor's motion to admit evidence of the prior conviction under the new statute.

MCL 768.27a provides:

> (1) Notwithstanding section 27, in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant. If the prosecuting attorney intends to offer evidence under this section, the prosecuting attorney shall disclose the evidence to the defendant at least 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown, including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered.
>
> (2) As used in this section:
>
> (a) "Listed offense" means that term as defined in section 2 of the sex offenders registration act, 1994 PA 295, MCL 28.722.
>
> (b) "Minor" means an individual less than 18 years of age.

Both CSC I, MCL 750.520b, and CSC II, MCL 750.520c, are "[l]isted offense[s]" within the meaning of the sex offenders registration act. MCL 28.722(e)(*x*). Accordingly, defendant in the instant case was presently "accused of committing a listed offense against a minor," and had previously been convicted of "another listed offense against a minor" in 1990. MCL 768.27a(1).

A

Defendant asserts that evidence of his plea-based CSC II conviction in 1990 was inadmissible under MRE 404(b) because it "failed the *VanderVliet* test." Our Supreme Court has explained that evidence of prior bad acts is admissible pursuant to MRE 404(b) if: (1) the evidence is relevant to an issue other than propensity, (2) the evidence is relevant to an issue or fact of consequence at trial as required by MRE 401, and (3) the evidence is not unduly prejudicial under MRE 403. *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993). The trial court agreed with defendant, and denied the prosecutor's motion to admit evidence of defendant's prior conviction under MRE 404(b). Thus, the question whether evidence of defendant's prior conviction was admissible under MRE 404(b) is not properly before us, as it was decided adversely to prosecution, which has not appealed. See *Greenwood v School Dist No 4 of Napoleon Twp*, 126 Mich 81, 84; 85 NW 241 (1901).

B

Defendant next asserts that application of MCL 768.27a in this case violated the constitutional prohibition against ex post facto laws because the sexual assault of the victim took place before the statute's effective date. Both the United States and Michigan Constitutions prohibit ex post facto laws. US Const, art I, § 10; Const 1963, art 1, § 10. However, as this Court has recently explained, application of MCL 768.27a in cases like this does not violate the

constitutional prohibition against ex post facto laws. *People v Pattison*, ___ Mich App ___; ___ NW2d ___ (2007) (Docket No. 276699, released September 11, 2007), slip op at 3. See also *People v Dolph-Hostetter*, 256 Mich App 587; 664 NW2d 254 (2003).

C

Defendant also claims that MCL 768.27a should not have been retrospectively applied in this case because, had the Legislature intended for MCL 768.27a to be applied retroactively, it would have set forth its intention in the language of the statute. Albeit in the context of a different evidentiary statute, a similar argument was rejected in *Dolph-Hostetter*, *supra* at 601:

> We next address defendant's argument that the amended marital-communications privilege cannot operate retrospectively because the Legislature did not expressly indicate that it be given retrospective effect. Defendant admits in her appellate brief that "[t]he language of the statute is most instructive of the legislative intent." By its plain language, 2000 PA 182, adopted and approved on June 20, 2000, became effective on October 1, 2000. At court proceedings on or after that date, the amended statute controlled the admissibility of marital communications.

Likewise, by its plain language, MCL 768.27a became effective on January 1, 2006. See 2005 PA 135. Accordingly, at all court proceedings on or after January 1, 2006, MCL 768.27a controlled the admissibility of evidence that the defendant had previously committed "another listed offense against a minor." *Dolph-Hostetter*, *supra* at 601. As noted above, defendant's trial did not begin until after January 1, 2006. The trial court properly applied MCL 768.27a at defendant's trial in this case, and defendant's argument that the Legislature did not intend for MCL 768.27a to apply retroactively is without merit.[5] *Dolph-Hostetter*, *supra* at 601.

D

Defendant next contends that the Legislature's promulgation of MCL 768.27a amounts to an unconstitutional usurpation of the judicial rule-making authority granted under the Michigan Constitution. Defendant contends that because MCL 768.27a conflicts with MRE 404(b), MRE 404(b) must prevail.

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[5] In addition, "simply because a statute relates to an antecedent event, it is not necessarily regarded as operating retrospectively." *Tobin v Providence Hosp*, 244 Mich App 626, 661; 624 NW2d 548 (2001). Although defendant allegedly assaulted the victim *before* the effective date of MCL 768.27a, it is undisputed that he was not tried until *after* the statute's effective date. A retrospective law is a law that "'takes away or impairs vested rights acquired under existing laws, or creates a new obligation and imposes a new duty, or attaches a new disability with respect to transactions or considerations already past.'" *Id.* (citation omitted). "No one has a vested right in a rule of evidence." *Maki v Mohawk Mining Co*, 176 Mich 497, 503; 142 NW 780 (1913). Accordingly, applying MCL 768.27a at defendant's trial was not a true "retroactive application" of the law because it did not affect defendant's vested rights, but merely controlled the admission of evidence at defendant's criminal trial.

The Supreme Court is given the exclusive rulemaking authority regarding matters of practice and procedure in Michigan courts. Const 1963, art 6, § 5; *People v Conat*, 238 Mich App 134, 162; 605 NW2d 49 (1999). Matters of practice and procedure include the rules of evidence. *People v McDonald*, 201 Mich App 270, 272; 505 NW2d 903 (1993). The Legislature may not enact a rule of evidence that is purely procedural, i.e. one that is not backed by any clearly identifiable policy consideration other than the administration of judicial functions. See *McDougall v Schanz*, 461 Mich 15, 29-31; 597 NW2d 148 (1999). However, rules of evidence are not always purely procedural, and may have legislative policy considerations as their primary concern. *Id*. at 33-35.

As this Court has recently concluded, "MCL 768.27a is a substantive rule of evidence because it does not principally regulate the operation or administration of the courts." *Pattison, supra*, slip op at 3. "Instead, it reflects the Legislature's policy decision that, in certain cases, juries should have the opportunity to weigh a defendant's behavioral history and view the case's facts in the larger context that the defendant's background affords." *Id*. at 3-4. "The decision to enact a statute like MCL 768.27a and to allow this kind of evidence in certain cases reflects a . . . policy choice, and it is no less a policy choice because it is contrary to the choice originally made by our courts. Therefore, MCL 768.27a is substantive in nature, and it does not violate [Const 1963, art 6, § 5]." *Id*. at 4 (citation omitted).

Defendant suggests that MCL 768.27a conflicts with MRE 404(b) because it purports to allow the admission of evidence concerning a defendant's past acts of sexual assault against a minor, and because it would allow the use of such evidence to show that the defendant acted in conformity with this prior conduct. We recognize that the Legislature may only enact procedural rules of evidence if those rules do not conflict with the Michigan Rules of Evidence. MRE 101. Even assuming, however, that MCL 768.27a and MRE 404(b) are in direct conflict, the statute still controls. As noted above, MCL 768.27a does not merely govern matters of practice and procedure. *Pattison, supra*, slip op at 3-4. "'[I]n resolving a conflict between a statute and a court rule, the court rule prevails if it governs practice and procedure.'" *Conant, supra* at 163 (citation omitted). "*However, if the statute does not address purely procedural matters, but substantive law, the statute prevails*." *Id*. (emphasis added). Even though the trial court indicated that it would have disallowed the evidence of defendant's past acts under MRE 404(b) alone, it properly allowed introduction of the evidence under MCL 768.27a, which is a matter of substantive law. *Conant, supra* at 164.

E

Lastly, defendant contends that even if MCL 768.27a is constitutional and otherwise enforceable, the evidence of his prior bad act was irrelevant and unfairly prejudicial. MRE 402; MRE 403. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Irrelevant evidence is inadmissible. MRE 402. Defendant maintains that his conduct with the victim's private parts was merely accidental. However, the challenged evidence of defendant's prior CSC II conviction tends to make this assertion less probable. Accordingly, the evidence concerning defendant's prior CSC II conviction was relevant. MRE 401.

Even if relevant, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." MRE 403. Although evidence of certain acts of child molestation are admissible under MCL 768.27a, the trial court must still "take seriously [its] responsibility to weigh the evidence's probative value against its undue prejudice in each case before admitting the evidence." *Pattison*, *supra*, slip op at 4. The inquiry under MRE 403 is whether the evidence was *unfairly* prejudicial because, presumably, all evidence presented by the prosecution is prejudicial to the defendant to some degree. *People v Pickens*, 446 Mich 298, 336; 521 NW2d 797 (1994); see also *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998) (stating that MRE 403 "does not prohibit prejudicial evidence; only evidence that is unfairly so"). "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *Id.*

Even assuming that the admission of evidence concerning defendant's prior conviction was unfairly prejudicial to defendant under MRE 403, the error does not require reversal in this case. The erroneous admission of evidence is a nonconstitutional error. *People v Whittaker*, 465 Mich 422, 426; 635 NW2d 687 (2001). Therefore, defendant is entitled to reversal only if he can establish that it was more probable than not that the error in admitting the evidence was outcome determinative. *Id.* at 427; *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). On appeal, defendant makes no attempt to persuade this Court that the jury would have acquitted him if the trial court had not allowed the evidence of his prior conviction. Accordingly, defendant has failed to meet his burden of establishing outcome-determinative evidentiary error in this regard. *Whittaker*, *supra* at 427.

III

Defendant next argues that the trial court erred in allowing the prosecutor to introduce evidence concerning his pretrial plea offer. He specifically claims that the evidence of his pretrial plea offer violated MRE 408, and that the trial court therefore abused its discretion in allowing the evidence. We review a trial court's evidentiary decisions for an abuse of discretion. *Martin*, *supra* at 315. A trial court abuses its discretion when it fails to select a principled outcome. *Babcock*, *supra* at 269.

Before trial, defendant sent the trial court a letter in which he wrote, "CSC fourth degree is fair and justifiable in my case, which I am willing to accept." After defendant admitted on cross-examination that he "copped a plea" in 1990, the prosecutor asked him, "Isn't it true, sir, in this case, you wanted to cop a plea?" The defense objected, arguing that "[t]here is a specific rule" that "provides any offer in compromise, negotiations, settlement . . . is not permitted." The prosecutor argued that because "[t]hat particular rule pertains to letters and notifications written to the prosecutor" and because defendant wrote the letter to the trial court, the letter was admissible.

The trial court permitted the prosecutor to question defendant regarding his letter to the court. Before the prosecutor resumed examining defendant, the trial court instructed the jury that they were "not to assume" that defendant had entered into any plea negotiations with the prosecutor. The prosecutor then asked defendant the following questions:

Q. Mr. Xiong, isn't it true that you wrote the Judge a letter?

A. Yes.

Q. And in your letter you were requesting a plea of criminal sexual conduct fourth degree, right?

* * *

Q. Is that your letter, sir?

A. Yes.

Q. And my question again, sir, isn't it true that you had requested a plea of criminal sexual conduct fourth degree and you'd be willing to accept that?

A. Yes, because of what happened.

Defendant now asserts that the trial court erred in allowing the prosecutor to question him regarding his letter because the letter was an offer to compromise and because MRE 408 prohibits reference to all such offers.[6] MRE 408 provides:

[6] Defendant does not specifically argue that his letter to the trial court was inadmissible under MRE 410, which governs the admissibility of pleas and plea discussions. MRE 410 provides in relevant part:

> Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:
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> * * *
>
> (4) Any statements made in the course of plea discussions with any attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.
>
> However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.

Any argument that evidence of defendant's letter to the trial court was inadmissible under MRE 410 would be without merit because defendant's letter was written to the trial court rather than to an "attorney for the prosecuting authority . . . ." Nonetheless, defendant suggests that because criminal defendants are "unschooled in the law," a defendant would logically attempt to plea bargain with the court instead of the prosecuting attorney, and the fact that his offer to plead guilty was directed to the court rather than to the prosecutor made it no less a bona fide plea offer

(continued…)

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

In his brief on appeal, defendant cites no case law to support his implied assertion that MRE 408 applies to statements regarding plea negotiations in criminal cases. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Kelly*, 231 Mich App 627, 641; 588 NW2d 480 (1998). Accordingly, defendant has abandoned his claim that the trial court abused its discretion under MRE 408 in allowing the prosecutor to examine him regarding his letter to the trial court. *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004).

Nonetheless, even if this argument had not been abandoned, we would still disagree with defendant. Because the Michigan Rules of Evidence are based on the Federal Rules of Evidence, Michigan courts may refer to federal cases interpreting the Federal Rules of Evidence for guidance in their interpretation of the Michigan Rules of Evidence. *People v Katt*, 468 Mich 272, 280; 662 NW2d 12 (2003).

MRE 408 is substantially similar to FRE 408. Based on the plain language of FRE 408—including the words "claim," "amount," and "validity"—several federal courts of appeals have concluded that the rule applies only in the context of civil litigation. *United States v Logan*, 250 F3d 350, 367 (CA 6, 2001); *United States v Prewitt*, 34 F3d 436, 439 (CA 7, 1994); *United States v Baker*, 926 F2d 179, 180 (CA 2, 1991). "The reference to 'a claim which was disputed as to either validity or amount' does not easily embrace an attempt to bargain over criminal charges. Negotiations over immunity from criminal charges or a plea bargain do not in ordinary

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within the meaning of MRE 410. We are unconvinced by this argument. First, we must interpret the plain language of MRE 410 as written. The rule does not refer to the trial court, but only to an "attorney for the prosecuting authority . . . ." We also note that a trial court may not participate in discussions aimed at reaching a plea and must remain detached and neutral in the plea bargaining process. *People v Killebrew*, 416 Mich 189, 204-205; 330 NW2d 834 (1982). Moreover, because defendant pleaded guilty to CSC II in 1990, we cannot agree that he was "unschooled" regarding the plea-bargaining process. Finally, defendant was represented by an attorney at all relevant times. Consequently, even if defendant did not technically know how to request a plea bargain, he had an attorney who could have properly relayed his request for a plea bargain to the prosecutor rather than to the court.

parlance constitute discussions of a 'claim' over which there is a dispute as to 'validity' or 'amount.'" *Baker*, *supra* at 180.

We find the reasoning of the above federal cases persuasive, and conclude that MRE 408 only governs the admission of evidence relating to compromise or negotiations made in the context of civil litigation. In other words, MRE 408 does not govern the admission of evidence relating to a defendant's attempts to plead guilty in a criminal matter. Because defendant's letter to the trial court was not written in an effort to settle a civil lawsuit, the trial court did not abuse its discretion under MRE 408 in permitting the prosecutor to introduce evidence of defendant's letter at trial. *Martin*, *supra* at 315.

IV

Defendant next contends that the prosecutor engaged in "egregious acts of prosecutorial misconduct" at trial. Specifically, defendant complains that the prosecutor committed misconduct when she cross-examined him concerning his 1990 guilty plea and pretrial plea-offer in the present case, and when she suggested that he had fled the jurisdiction and was "living in the woods" of Oregon at the time of his arrest. Defendant further argues that the prosecutor committed misconduct by asking him whether he had made any mistakes in his life and whether he had learned from these mistakes. Defendant asserts that the prosecutor's questions were "inflammatory" and were designed to portray him "as a wily manipulator of the criminal justice system."

We review unpreserved claims of prosecutorial misconduct for plain error affecting the defendant's substantial rights. *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002). A defendant's substantial rights are affected if the misconduct affected the outcome of the trial. *People v Barber*, 255 Mich App 288, 296; 659 NW2d 674 (2003). Reversal is not required if the prejudicial effect of the prosecutor's comments could have been cured with a timely instruction. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

Because defendant did not raise the issue of prosecutorial misconduct in his statement of the questions presented, he has abandoned this issue on appeal. MCR 7.212(C)(5); *People v Albers*, 258 Mich App 578, 584; 672 NW2d 336 (2003); *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999). Moreover, there is simply no indication that any improper statements by the prosecutor could not have been cured by a timely instruction to the jury. *Watson*, *supra* at 586. A curative instruction is sufficient to dispel the prejudicial effect of most inappropriate prosecutorial statements, *People v Humphreys*, 24 Mich App 411, 414-415; 180 NW2d 328 (1970), and jurors are presumed to follow their instructions, *People v Mette*, 243 Mich App 318, 330-331; 621 NW2d 713 (2000). We perceive no outcome-determinative plain error in this regard. *Rodriguez*, *supra* at 32.

V

Defendant next argues that there was insufficient evidence introduced at trial to support the jury's verdict of guilty. When reviewing the sufficiency of the evidence in a criminal case, we view the evidence in a light most favorable to the prosecution to determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002).

Defendant was charged with CSC I for engaging in sexual penetration with a person under 13 years of age. MCL 750.520b provides in pertinent part:

> (1) A person is guilty of criminal sexual conduct in the first degree if he or she engaged in sexual penetration with another person and if any of the following circumstances exist:
>
> (a) That other person is under 13 years of age.

Defendant does not contend that the victim was not under 13 years of age at the time of the alleged offense. Rather, he suggests that there was insufficient evidence of sexual penetration. "[S]exual penetration" is an essential element of CSC I. *People v Lemons*, 454 Mich 234, 253; 562 NW2d 447 (1997). The Legislature has defined sexual penetration as:

> [S]exual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required. [MCL 750.520a(p).]

"Any evidence of penetration, no matter how slight, is sufficient to establish the 'penetration' requirement . . . ." *People v Hunt*, 442 Mich 359, 364; 501 NW2d 151 (1993). Moreover, sexual penetration can be for any purpose. *Lemons*, *supra* at 253. It does not require proof that the defendant intended to seek sexual arousal or gratification. *Id.*

In the present case, the victim testified that after defendant grabbed her buttocks and pulled down her pants, he put his finger into her "private part." Agent Suratt testified that defendant admitted during his interview that, after he approached the victim in the library and rubbed her bare buttocks, his finger penetrated her anus for approximately three seconds. Although the nurse examiner testified that, in response to her questions, the victim indicated that defendant had not penetrated her vagina or anus, the nurse was unsure if the victim had understood her questions regarding penetration. In addition, the nurse found "a fairly fresh scratch" on the victim's left inner thigh near her genitalia.

Conflicts in the evidence must be resolved in the prosecution's favor. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). Moreover, this Court does not weigh competing evidence; that is the jury's function. *People v Hardiman*, 466 Mich 417, 431; 646 NW2d 158 (2002). Drawing all reasonable inferences and making all credibility choices in support of the jury verdict, we conclude that a rational trier of fact could have found beyond a reasonable doubt that defendant penetrated the victim's anus. *Hunter*, *supra* at 6; *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). Defendant's CSC I conviction was supported by sufficient evidence.

VI

Defendant similarly argues that the jury's guilty verdict was against the great weight of the evidence. We review a trial court's grant or denial of a new trial on the ground that the verdict was against the great weight of the evidence for an abuse of discretion. *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001).

On appeal, defendant argues that his conviction for CSC I was against the great weight of the evidence because "[a]ny arguable evidence of penetration was heavily outweighed by a wealth of evidence that no penetration whatsoever occurred." A trial court may grant a motion for a new trial based on the great weight of the evidence only if the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998); *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998). Conflicting testimony and questions of witness credibility are insufficient grounds for granting a new trial. *Lemmon*, *supra* at 643. Absent exceptional circumstances, issues of witness credibility are for the trier of fact. *Id*. at 642-643.

In the present case, there was conflicting evidence regarding whether defendant penetrated the victim's anus. Although the alleged sexual conduct occurred in a public library, no one observed it. The victim testified that defendant put his finger in her "private part," and defendant admitted to Suratt that his finger penetrated the victim's anus for three seconds. On the other hand, the nurse examiner testified that the victim told her that defendant did not penetrate her. However, the nurse examiner was unsure whether the victim had understood her questions concerning penetration.

Although the victim could not recall all the contextual details of the assault, her testimony that defendant penetrated her was not so inherently implausible that it could not be believed by a reasonable juror. *Lemmon*, *supra* at 644. It was also independently supported by defendant's confession to Suratt. In light of the nurse examiner's uncertainty concerning whether the victim even understood her questions, the nurse's testimony does not deprive the testimony of the victim and Suratt of all probative value such that a reasonable jury could not believe it. *Id.* at 643. Defendant's conviction for CSC I was not against the great weight of the evidence, and the trial court did not abuse its discretion in denying defendant's motion for a new trial on this ground. *McCray*, *supra* at 637.

VII

Defendant next argues that the trial court abused its discretion by allowing the prosecutor to amend the information to charge digital-anal penetration rather than digital-vaginal penetration, as was originally alleged in this case. We review a trial court's decision on a motion to amend the information for an abuse of discretion. *People v McGee*, 258 Mich App 683, 686-687; 672 NW2d 191 (2003).

A trial court may amend the information at any time to correct a variance between the information and the proofs, unless doing so would unfairly surprise or prejudice the defendant. MCL 767.76; MCR 6.112(H); *People v Russell*, 266 Mich App 307, 317; 703 NW2d 107 (2005). Defendant was not prejudiced or unfairly surprised by the amendment in this case. "He was bound over on a charge of first-degree criminal sexual conduct and was convicted of first-degree criminal sexual conduct. While the information was amended to reflect a variance in the type of penetration, defendant was not convicted of a new crime." *People v Stricklin*, 162 Mich App 623, 633; 413 NW2d 457 (1987). Nor was defendant deprived of an opportunity to defend against the crime. *Id*. Nothing in the record suggests that defendant would have presented a different defense at trial if the charge had originally been CSC I involving anal penetration rather than CSC I involving vaginal penetration. *Id*. at 633-634. The trial court did not abuse its

discretion by allowing the prosecutor to amend the information to charge a different method of sexual penetration. *McGee*, *supra* at 686-687.

VIII

Defendant additionally argues that because he had been convicted of only two prior felonies, the trial court erred in sentencing him as a fourth habitual offender under MCL 769.12. Defendant also contends that the trial court failed to adequately articulate its reasons for upwardly departing from the sentencing guidelines in this case. Although there was sufficient evidence that defendant had committed three prior felonies, we find that defendant is entitled to resentencing.

We review a trial court's decision to impose an increased sentence pursuant to the habitual offender act for an abuse of discretion. *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005). A trial court abuses its discretion when it fails to select a principled outcome. *Babcock*, *supra* at 269.

Generally, we must affirm a sentence that falls within the recommended minimum sentence range under the legislative guidelines. MCL 769.34(10). However, in this case the trial court upwardly departed from the recommended minimum sentence range. We review for clear error the trial court's determination that a factor exists to justify an upward departure from the sentencing guidelines. *Babcock*, *supra* at 264-265. We review de novo the question whether that sentencing factor is objective and verifiable. *Id.* Finally, we review for an abuse of discretion whether the objective and verifiable factor constitutes a substantial and compelling reason to depart from the recommended minimum sentence range. *Id.* at 265.

In his motion for resentencing, defendant argued that because he had only two prior felony convictions, the trial court erred in sentencing him as a fourth habitual offender under MCL 769.12. The prosecutor informed the trial court that defendant had four prior convictions, including two "Utica" convictions, the plea-based CSC II conviction in 1990, and two convictions for unlawful use of a motor vehicle. Based on this information, the trial court stated that there was "a basis for [its] determination of the habitual fourth," and sentenced defendant as a fourth habitual offender.

Defendant continues to argue that the trial court erred in sentencing him as a fourth habitual offender because he had only two prior felony convictions. However, defendant's entire argument on appeal relating to this issue consists of the following sentence: "Defendant submits that he has only two (2) prior felonies and not three (3)." "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *Kelly*, *supra* at 641. Defendant has strictly abandoned this issue by failing to adequately define the substance of his argument. *Harris*, *supra* at 60.

Nonetheless, we find that there was sufficient evidence presented to the trial court that defendant had been convicted of three prior felonies. MCL 769.12 provides in pertinent part:

> (1) If a person has been convicted of any combination of 3 or more felonies or attempts to commit felonies, whether the convictions occurred in this

> state or would have been felonies or attempts to commit felonies in this state if obtained in this state, and that person commits a subsequent felony within this state, the person shall be punished upon conviction of the subsequent felony and sentencing under section 13 of this chapter as follows:
>
> (a) If the subsequent felony is punishable upon a first conviction by imprisonment for a maximum term of 5 years or more or for life, the court, except as otherwise provided in this section or section 1 of chapter XI, may sentence the person to imprisonment for life or for a lesser term.

The presentence investigation report (PSIR) reveals that defendant was convicted by a jury in 1986 of two counts of unlawfully driving away an automobile (UDAA).[7] UDAA is a felony. MCL 750.413. In July 1990, defendant pleaded guilty to one count of CSC II. CSC II is also a felony. MCL 750.520c(2). Accordingly, there was sufficient evidence presented to establish that defendant was convicted of three felonies before he committed the instant offense. MCL 769.12(1); MCL 769.13(5)(d). The trial court did not abuse its discretion in determining that defendant was eligible for sentencing as a fourth habitual offender under MCL 769.12. *Mack*, *supra* at 125.

Defendant also argues that, in sentencing him to life in prison, the trial court departed from the recommended minimum sentence range under the legislative guidelines without stating its reasons for the departure on the record as required by MCL 769.34(3). When it sentenced defendant to life imprisonment, the trial court stated:

> It is the sentence of the Court, Mr. Xiong, that you are beyond rehabilitation. The Court finds that having heard the testimony in this case, aware of your criminal history, that it is absolutely appropriate that you be remanded to the custody of the Michigan Department of Corrections for your nature life.

In his motion for resentencing, defendant argued that the trial court erred when it departed from the recommended minimum sentence range without stating any reasons for the departure on the record. At the hearing on defendant's motion for resentencing, the trial court affirmed its sentence of life in prison:

> There's two arguments that we have to consider, one is with the habitual four which permits the Court to give life, and we have the statutory penalty which is life or any term of years. We have two arguments, the first being the life with the habitual fourth, and that argument, this Court finds that based on the record given he is habitual four, that there is a substantial – that there is a basis for the

[7] At the sentencing hearing, defendant argued that these two charges were "the same offense" because he only stole one car. The trial court gave defendant permission to seek an amendment to the PSIR if he had evidence that he was only convicted of one count of UDAA. However, defendant did not seek an amendment to the PSIR. Nor has he provided this Court with any evidence that he was only convicted of one count of UDAA.

Court's determination of the habitual fourth. Therefore, life would be appropriate.

The other argument, however, with respect to the statute, it is the contention, I understand, of Mr. Xiong that when guidelines are imposed the Court's constrained to follow those guidelines and sentence within a term of years as opposed to generating a life sentence.

* * *

With respect to the statute, irrespective of the Court's life sentence and in addition to the life sentence imposed based on the habitual, this Court believes that the life or any term of years leaves discretion to the Court and that discretion was exercised by this Court in imposing a life sentence.

The basis of this Court's determination of life, the Court is cognizant of the criminal sexual conduct case that took place prior that Mr. Xiong served 15 years for. The facts and circumstances surrounding that case I believe – were it's been awhile, but when I imposed sentence, I think it was a seven year old.

* * *

[W]hich he repeatedly had sex with and attributed the sexual relations to the fault of the minor. Following his release after serving a full term finding no—that he was not let out early, he served the full term because apparently rehabilitation was not successful, but aside from that, the Court did not consider whether or not he was rehabilitated. The fact is he served the full 15 years. When released he finds another victim, although of tender years, not seven or eight years old, but who suffered apparently from a learning disability and took advantage of that person, and again did not admit fault associated with his conduct relative to that person.

The Court having heard that testimony did not believe any term of years would be sufficient to protect society nor [do I] think there was any opportunity for rehabilitation. *The guidelines don't apply to those situations and I believe that the Court has the ability with life or any term of years to exercise its discretion in imposing the life sentence.* That's what I did, and maybe the Court of Appeals disagrees but I believe life was appropriate, and that sentence remains in place. [Emphasis added.]

It is apparent from these words that the trial court did not believe that it was constrained to follow the legislative guidelines when sentencing defendant. The trial court twice stated that it had the discretion to sentence defendant to "life or to any term of years."[8]

[8] A life sentence is not within the guidelines even though authorized by statute unless it is also included in the applicable grid cell for the sentencing offense. See *People v Greaux*, 461 Mich (continued…)

The legislative sentencing guidelines apply to habitual offenders. MCL 777.21(3). Accordingly, absent "substantial and compelling reasons," the trial court was required to impose a minimum sentence on defendant that fell within the recommended minimum sentence range under the legislative guidelines. *Babcock*, *supra* at 255-256.

Defendant was convicted of CSC I, a class A crime. MCL 777.16y. The PSIR indicated that defendant had a prior record variable (PRV) level of "E" and an offense variable (OV) level of "III." The recommended minimum sentence range for defendant, taking into account his status as a fourth habitual offender, was therefore 126 to 420 months in prison. See Michigan Sentencing Guidelines Manual (2007), p 89.[9] Accordingly, the trial court's sentence of life imprisonment was a departure from the recommended minimum sentence under the legislative guidelines.

A trial court may depart from the recommended minimum sentence range only if there is a "substantial and compelling reason" for doing so. *Babcock*, *supra* at 255-256. When a trial court departs from the recommended minimum sentence range, it is required to state on the record its reason for the departure. MCL 763.34(3); *Babcock*, *supra* at 258.

The trial court articulated two reasons for sentencing defendant as it did: (1) it did not believe that a term of years was sufficient to protect society, and (2) it did not believe that a term of years provided defendant with an opportunity for rehabilitation. However, the trial court did not articulate these two reasons as grounds for departing from the sentencing guidelines. Instead, it merely articulated these reasons to explain why it was sentencing defendant to life imprisonment rather than to a term of years, as it believed it was permitted to do under MCL 769.12(1)(a).

As noted above in footnote 8, the trial court was required to "follow the departure rules because the sentencing guidelines did not recommend a sentence of life in prison." *People v Johnigan*, 265 Mich App 463, 473-474; 696 NW2d 724 (2005). However, there is no indication on the record that the trial court even knew that it was required to impose a minimum sentence within the recommended minimum sentence range. Nor is there any indication that trial court

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(…continued)

339, 345; 604 NW2d 327 (2000). Despite the fact that MCL 769.12(1)(a) authorizes a sentence of life in prison if the fourth felony conviction would have been punishable on a first conviction by five years or more, the trial court must nevertheless calculate the guidelines range for the fourth felony conviction and must put substantial and compelling reasons on the record if it departs from those guidelines. *People v Johnigan*, 265 Mich App 463, 473-475, 478-479; 696 NW2d 724 (2005) (opinions of SAWYER, J., and SCHUETTE, J., concurring). In other words, although a life sentence was authorized under MCL 769.12(1)(a), the trial court was nonetheless required to "follow the departure rules because the sentencing guidelines did not recommend a sentence of life in prison." *Id*. at 473-474.

[9] The baseline recommended minimum sentence for a defendant who is convicted of a class A crime with a PRV level of "E" and an OV level of "III" is 126 to 210 months in prison. MCL 777.62. However, because defendant was a fourth habitual offender, the upper limit of the recommended minimum sentence range was increased by 100 percent, to 420 months. MCL 777.21(3)(c).

believed that society's need to be protected from defendant and defendant's inability to rehabilitate himself were substantial and compelling reasons for departing from the recommended sentence range.

We recognize that "[a]lthough the trial court must articulate a substantial and compelling reason to justify its departure, the trial court is not required to use any formulaic or 'magic' words in doing so." *Babcock, supra* at 259 n 13. However, the trial court's observation that it was choosing to sentence defendant to life imprisonment because of society's need to be protected and defendant's inability to rehabilitate himself did not constitute a determination by the trial court that substantial and compelling reasons existed for departing from the recommended minimum sentence range under the legislative guidelines. Because the trial court failed to articulate substantial and compelling reasons for departing from the recommended minimum sentence range of 126 to 420 months in prison, we vacate defendant's sentence and remand for resentencing consistent with this opinion. See *Johnigan*, *supra* at 478.

IX

Finally, defendant argues that the cumulative effect of the errors committed in this case deprived him of a fair trial and due process of law. The cumulative effect of several errors may warrant reversal even when one error standing alone does not require reversal. *People v Miller (After Remand)*, 211 Mich App 30, 44; 535 NW2d 518 (1995). However, only actual errors may be aggregated to determine the cumulative effect. *People v Bahoda*, 448 Mich 261, 292 n 64; 531 NW2d 659 (1995). Because we have identified only one true error in this case—an improper departure from the sentencing guidelines—there necessarily can be no cumulative effect of aggregated multiple errors. See *People v Anderson*, 166 Mich App 455, 473; 421 NW2d 200 (1988).

We affirm defendant's conviction, but vacate defendant's sentence and remand for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Christopher M. Murray